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No. 94-6615

Supreme Court, U.S.
FILED
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1994

JAN 13 PAGE 12

CARL THOMPSON,

Petitioner,

vs.

PATRICK KEOHANE, Warden,
BRUCE M. BOTELHO, Attorney General,
State of Alaska,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS FOR THE

NINTH CIRCUIT

PETITIONER'S REPLY BRIEF

CARL THOMPSON
Petitioner
In Pro Per
Reg. No. 90712-011 (C-Unit)
3901 Klein BLVD.
Lompoc, CA. 93436

10 pp

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REASONS FOR GRANTING THE WRIT

I. THE SPLIT IN THE CIRCUIT COURT'S APPLIED TO TRIAL COURT DETERMINATIONS OF CUSTODY SHOULD BE RESOLVED AT THIS TIME.

The Respondent does not really argue the split in the Circuit Court's, but instead relies on Miller v. Fenton, 474 U.S. 104, in determining whether a issue is one of fact or law in the habeas context.

Respondent's contention that the Miller case supports the Ninth Circuit's conclusion, when it held that a state court's determination of when a person was not in custody for Miranda purposes was a factual one.

While Petitioner to a point agrees with the methodology in Miller v. Fenton, 474 U.S. ante, Respondent's argument fails, because facts such as the lenght and circumstances of the interogation, the defendant's prior experience with the legal process, and familiarity with the Miranda warnings are inline with §2254(d), but once such underlying factual issues have been resolved, and the moment comes for determining whether, under the totality of the circumstances Miranda was violated in a manner inconsistent with the constitution, the state court judge is not in an appreciably better position than the federal habeas court to make that determination.

Furthermore, Miranda warnings or lack of a warning, almost always occur not in open court, but in a controlled , secret police dominated environment. Miranda v. Arizona, 384 U.S. at 458, 16 L Ed 2d 709, 86 S.Ct. 1602.

The Ninth Circuit erred when it appled a clearly erroneous standard in Petitioner's case, because it never applied the law to the facts, see the courts memorandum, (Appendix C).

The conclusions reached in Cobb v. Perini, 832 F.2d 346 (6th Cir. 1987), support Petitioner's contention that the question of custody should be treated as a legal determination, see Cf. Sullivan v. State of ALA., 666 F.2d 479 (11th Cir. 1982).

The Eleventh Circuit reviews the issue of custody as a mixed question of law and fact and applies the law to the facts; citing U.S. v. Torkington, 874 F.2d 1445 (11th Cir. 1989); Jacobs v. Singletary, 952 F.2d 1288 (11th Cir. 1992). Jacobs, was a case coming to the Eleventh Circuit from a state court on habeas. The Eleventh Circuit stated: "The district [sic] in its review however, incorrectly accorded the state court's findings a presumption of correctness pursuant to 28 U.S.C.A. §2254(d)." Supra, at 1288, "The question of whether a prior statement is consistant with trial testimony is a mixed question of law and fact and thus reviewable de novo," Davis v. Heyd, 479 F.2d 446-449 (5th Cir. 1973)." Citing Jacobs v. Singletary, supra at 1288.

The Third Circuit also agrees that a custody determination "is a legal term of art central to Miranda jurisprudence, and a decision whether on not 'custodial interrogation' occurred is a matter of law to be determined in accordance with the policies underlying the Miranda rule." United States v. Mesa, 638 F.2d 591 n.3 (3rd Cir. 1980); United States v. Rioseco,

845 F.2d 299-302 (11th Cir. 1988).

In U.S. v. Ceballas, 812 F.2d 46-47 (2nd Cir. 1987), the court found that what a reasonable person would think is reviewable as a question of law, but is entitled to some difference because the determination is inextricable intertwined with the credibility of the witnesses.

"[I]n First Amendment lible cases, the relevant legal principle can be given meaning only through its application to the particular circumstances of a case, the Court has been reluctant to give the trier of fact's conclusions presumptive force and, in so doing, strip a federal appellate court of its primary function as an expositor of the law." Citing Miller v. Fenton, 474 U.S. at 114 (citation omitted).

There is also a due process element that is present in the Miranda custody issue, that is closely intertwined with the voluntariness issue:

> "[T]actics for eliciting inculpatory statements must fall within the broad constitutional boundaries imposed by the Fourteenth Amendment's guarantee of fundamental fairness. Indeed, even after holding that the Fifth Amendment privilege against compulsory self-incrimination applies in the context of custodial interogation, (citation omitted) the Court has continued to measure confessions against the requirements of due process." (Citation omitted). Citing Miller v. Fenton, 474 U.S. at 110 (1985).

Due process is further compromised when a suspect is taken into custody or his freedom of movement is restricted, such that a reasonable person would not feel free to leave. Citing Miranda v. Arizona, 384 U.S. at 741; dissenting opinion by the Honorable Justice, Harlan, Justice Stewart and Justice White.

Respondent next argues, that Petitioner failed to raise this issue on direct appeal, and thus should be barred from doing so now.

Respondent's argument is groundless and is nothing more than subterfuge designed to impede justice. Citing this Court's holding in, Fay v. Noia, 372 U.S. 391, 9 L ed 2d 837, 83 S.Ct. 822 (1963), where this Court stated:

> "[C]onventional notions of finality in criminal litigation cannot be permitted to defeat the manifest federal policy that federal constitutional rights of personal liberty shall not be denied without the fullest opportunity for plenary federal judicial review." Id., at 860.
>
> "Jurisdiction is conferred by the allegation of an unconstitutional restraint and is not defeated by anything that may occur in the state court proceeding." Id., at 861-62 (Citation omitted).

II. THE HARMLESS ERROR RULE SHOULD NOT BE APPLIED IN THIS CASE.

And finally, Respondent argues that Petitioner's Writ does not warrant discretionary rewiew by this Court, because it falls under the "harmless error rule" st forth in Brecht v. Abrahamson, 507 U.S. ____, 113 S.Ct. 1710 (1993).

Petitioner for one, never took the stand in his defense, so his confession could not be used to impeach him if the instant case was overturned on remand.

Second, the harmless error rule was never raised in a previous court. The trial court in particular, never found harmless error applicable, so it should not be considered now.

Furthermore, it would frustrate this Court in addressing this issue, as it should be for the lower court to decide on remand.

The Respondent has not met the burden of proving that Petitioner's confession did not have a substantial and injurious effect or influence in determining the jury's verdict.

So, harmless error analysis should not be considered at this time.

CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the divergence in the Circuit Court's on the correct standard of review in the Miranda custody context. 1/

Dated: 12/21/94

Carl Thompson
Petitioner

1/ If this Court elects not to address the issue presented in this writ at the present time, it is requested the the writ issue and that the matter be remanded to the Ninth Circuit Court of Appeals for redetermination in light of the Eleventh Circuit's opinion in Jacobs v. Singletary, 952 F.2d 1288 (11th Cir. 1992).

William K. Suter
Clerk of The Court
United States Supreme Court
One First Street, NE
Washington, DC 20543

December 21, 1994

Re: Thompson v. Keohane, et al.
No. 94-6615

Dear Clerk:

Please find enclosed: Twelve (12) copies of Petitioner's Reply Brief; one (1) copy of the Certificate of Service.

Clerk, would you please make sure to include, (C-Unit) on all of my correspondence coming from the Court. It has been left out of my address in the past and has resulted in a significant delay in my mail reaching me.

Thank you very much.

Sincerely,

Carl Thompson

No. 94-6615

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1994

CARL THOMPSON,

Petitioner,

Vs.

PATRICK KEOHANE, Warden,
BRUCE M. BOTELHO, Attorney General,
State of Alaska,

Respondent.

CERTIFICATE OF SERVICE

Petitioner, Carl Thompson, certifies that pursuant to Rule 29, I served Respondent with one (1) copy of Petitioner's Reply Brief, by mailing the said copy, in a envelope, First Class mail, postage pre-paid, addressed to the following:

Cynthia M. Hora
Assistant Attorney General
Office of Special Prosecutions
and Appeals
Alaska Department of Law
310 K Street, Suite 308
Anchorage, Alaska 99510

Signed under penalty of perjury this 21st day of December, 1994.

Carl Thompson

CARL THOMPSON
Petitioner